(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. [redacted] 75

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMER ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

REPLY OF PETITIONERS, CITY OF NORTH CHICAGO, ET AL., TO OPPOSING BRIEF OF RESPONDENT, THE MACCABEES.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1140.

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMER ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

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THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

REPLY OF PETITIONERS, CITY OF NORTH CHICAGO, ET AL., TO OPPOSING BRIEF OF RESPONDENT, THE MACCABEES.

MAY IT PLEASE THE COURT:

On May 13, 1942, the respondent The Maccabees, filed herein a printed document of fifty-one pages, entitled as a Reply in the above numbered cause, and also as a petition on behalf of The Maccabees for a writ of certiorari and various procedural motions, all filed in a separate proceeding. Although constituting, according to its caption, a petition and four motions (one in the alternative),

in the separate proceeding as well as a Reply in No. 1140, this document is not so separated into its parts as to enable the undersigned counsel for the petitioners to determine specifically what parts are intended as an opposing brief in this case, and what parts are not so intended.

We believe that the portions of the document filed May 13, 1942, which are addressed to the question whether or not a writ of certiorari should issue in this case, are pages 27 to 33, inclusive, thereof. If there be arguments on other pages addressed specifically to the granting or refusal of the writ, we have not noticed them, and we submit as an excuse for our failure to segregate them, the fact that they are so interwoven with other portions of the document as to be inextricable.

Under the following points numbered I to V, we will endeavor to answer such parts of the above-described document as seem to constitute an opposing brief in this case under Rule 38(3) of this Court. We are not at this time filing an opposing brief nor taking any other steps in the separate proceeding.

I.

Petitioners and their counsel deny, with all of the emphasis possible on a printed page, the repeated assertions of respondent's counsel that they have committed frauds, conspiracies or tricks, and with equal emphasis deny his charges of improper motives or purposes in filing the petition for certiorari herein. The violent, vicious and libelous attacks upon the counsel for petitioners, made in the document filed May 13, 1942, are typical of the tactics which respondent's counsel has adopted and used in earlier stages of this litigation.

II.

At page 27 of the document filed May 13, 1942, it is charged that the order sought to be reviewed herein is not a final order. Of course it is not a final decree in the sense of an adjudication terminating the litigation between the parties. On the other hand, it is a final order so far as the Circuit Court of Appeals is concerned, since it has terminated the litigation in that Court. The propriety of allowing certiorari to review a judgment reversing and remanding a case is sustained by *Forsyth* v. *Hammond*, 166 U. S. 506, 511-513, and *Gay* v. *Ruff*, 292 U. S. 25, 30, and the cases there cited. These authorities show that this Court not only can, but frequently does allow certiorari in cases where the pleadings have reached the stage of those in the present case.

III.

On pages 29, 30 and 32, it is asserted that in the petition for certiorari we have misstated the Illinois law with respect to the availability of the remedy of mandatory injunction in a special assessment case. We deny that any misstatement was made. Respondent relies exclusively on the last sentence of Section 90 of the Illinois Local Improvements Act (quoted in the Petition herein, Appendix, page 29), and ignores the Illinois Supreme Court decisions cited in the petition: *Conway* v. *City of Chicago*, 237 Ill. 128, 135; *White* v. *City of Ottawa*, 318 Ill. 463, 473, and *Des Plaines Foundry Co.* v. *City of Des Plaines*, 335 Ill. 213, 216. Respondent cites no cases to the contrary, and the statute relied on was in force when the cases above cited were decided. It is apparent that Section 90 of the statute cannot have the all-inclusive effect ascribed to it by respondent. The Supreme Court of Illinois has held in the *Ottawa* and *Des Plaines* cases above cited that the

Local Improvements Act has abolished by implication the jurisdiction of equity in local improvement matters. We submit that our statement of Illinois law is correct, and that a State court could not, under the Illinois law, grant a mandatory injunction on a bill in equity like the one filed here.

IV.

At page 30, the respondent criticizes our citation of *Fineran* v. *Bailey*, 2 Fed. (2d) 363, and attempts to distinguish it by contrasting the applicable statutory provisions. We reply that the case was correctly cited. and that it holds that a Federal Court, in a case in which mandamus is the proper remedy, cannot grant a mandatory injunction to accomplish the same result which might have been accomplished in the State courts by mandamus. *Fineran* v. *Bailey* involved a contested nomination for public office. A Louisiana statute, Section 55 of Act No. 130 of 1916 (Dart's Louisiana General Statutes, 1932, Title XIX, Chapter 7, Section 2762) provided that there should be created a contest board composed of the secretary of state, the state auditor, the state treasurer and two electors named by the governor, which had authority to pass on objections to the regularity of nominating petitions. Thus, the plaintiff in *Fineran* v. *Bailey* was specifically given by law of Louisiana a non-judicial tribunal to which he might present his complaint; but the emphasis in the opinion of the Circuit Court of Appeals for the Fifth Circuit was not upon the failure of the plaintiff to resort to that tribunal. The ground of the decision was that the plaintiff could and should have obtained a writ of mandamus in the State courts.

V.

At page 33, counsel for the respondent criticizes the synopsis of the Illinois Local Improvements Act printed as an appendix to the petition herein. In reply, we point out first that the appendix only purported to be a synopsis and not a verbatim copy of the Act, except in the case of Sections 84 and 90, which are quoted in full; and second, that Section 73 referred to specifically on page 33 of the document filed May 13, 1942, deals exclusively with remedies given to a construction contractor. Section 90, dealing with the remedies of bondholders, is quoted in full.

We respectfully submit that the right of the petitioners to a writ of certiorari in this case is sustained by the recent decision of this Court in *Chicago* v. *Fieldcrest Dairies, Inc.*, ... U. S. ....., 86 L. Ed. Adv. Ops., 888, 890, decided April 27, 1942. The opinion of the Court in that case supports the propriety of the action of the late Judge Woodward, United States District Judge, in denying relief to the plaintiff below.

The writ of certiorari should be issued pursuant to the prayer of the petition herein.

Respectfully submitted,

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FRANK T. O'BRIEN,
LIONEL A. MINCER,
Chicago, Illinois,
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WHAM AND O'BRIEN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 75

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMER ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

REPLY OF PETITIONERS, CITY OF NORTH CHICAGO, ET AL., TO THE SECOND OPPOSING BRIEF OF RESPONDENT, THE MACCABEES.

HAROLD J. TALLETT,
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REPLY OF PETITIONERS, CITY OF NORTH CHICAGO, ET AL., TO THE SECOND OPPOSING BRIEF OF RESPONDENT, THE MACCABEES.

MAY IT PLEASE THE COURT:

The petitioners* have heretofore filed a reply to the first opposing brief of The Maccabees. That brief has been withdrawn. We respectfully request the Court, however, to consider the applicable authorities and argument in our previous reply as well as those herein contained.

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* The City of North Chicago, Illinois, and its present officials none of whom held office at the time of the construction of the sewer for which the special assessment was spread.

I.

The principal question presented by the petition herein is whether a Federal court should grant mandatory relief in equity involving coercion of an Illinois municipality and its officials in a case where the Illinois law would not have sanctioned equitable relief by injunction. This question has not been answered by the respondent, in fact it seems to have been studiously avoided, yet if the decision of the Court of Appeals stands it is an adjudication that the Federal court can and must grant such relief in a proper case, the Illinois decisions to the contrary notwithstanding.

The respondent insists at page 12 and elsewhere in its brief, "that had it made application for relief to an Illinois state court sitting in equity on the basis of its Bill of Complaint in this cause, it would have been entitled to the relief prayer for." The Illinois law is otherwise. In *White* v. *City of Ottawa*, 318 Ill. 463, which was a suit in equity, that court said at page 466:

> "The *material question* presented for decision is *whether a court of equity has jurisdiction to grant relief where the improvement is not being constructed in compliance with the contract and ordinance* but is of materially less value and durability than the improvement required by the ordinance, which the contractor agreed to construct." (Italics ours.)

and held at page 472, 3:

> "By the amendment the legislature has clearly conferred special jurisdiction on the court in which the assessment was confirmed, and it has as clearly expressed its intention that said court shall have sole jurisdiction of the questions involved in this appeal. That is sufficient, in addition to what has already been here said, for this court's holding that *the jurisdiction of the circuit court heretofore entertained by injunction is abolished by said amendment by implication, and we accordingly so hold.*" (Italics ours.)

To the same effect is *DesPlaines Foundry Co.* v. *City of DesPlaines,* 335 Ill. 213, 216.

Respondent's petition is still pending in the County Court of Lake County (R. 17). It has never sought the writ of mandamus available to it, if warranted by the facts of the case under the decisions of the Supreme Court of Illinois in *Conway* v. *City of Chicago,* 237 Ill. 128, 135; *Price* v. *Board of Local Improvements,* 266 Ill. 299, and many other cases.

II.

Respondent realizing therefore that the principal question must be answered in the negative endeavors to escape this answer by relying on two secondary points, both unsound. First it says the action is not one for mandatory relief *only,* but for such relief *plus* compensatory damages, and second, that there is no adequate remedy under the State law.

III.

As to the first point we will not enter again upon a lengthy discussion of the theory of the Bill, having analyzed it in detail in our petition. We do observe, however, that the *specific* relief sought against *these petitioners* is a mandatory injunction, and an accounting. The Illinois decisions above cited preclude relief by injunction, and the accounting phase of the Bill involves less than $1,700 (R. 26). The only relief available as to these petitioners therefore is mandamus, and the respondent seems to argue that since the County court has no jurisdiction to grant the writ of mandamus (pp. 10 and 11 of its brief) it follows that the Federal court should have the right to do so. This argument ignores the obvious remedy by mandamus available to the respondent in the State court of general jurisdiction, namely the Circuit court (see *Conway* and *Price* cases above). Furthermore, it ignores

the many decisions of this Court holding that Federal courts have no general power of mandamus.

In *Covington Bridge Co.* v. *Hager,* 203 U. S. 109, 110, this Court said:

> "We are of the opinion that the court below had no jurisdiction of this action. It has been too frequently decided in this court to require the citation of cases that the Circuit Courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process."

See also *Knapp* v. *Lake Shore Ry. Co.,* 197 U. S. 536; *Rosenbaum* v. *Bauer,* 120 U. S. 450, and Hughes Federal Practice (1931), Vol. 1, sec. 268.

Under these authorities the District Court in the case at bar having no jurisdiction to award mandamus, quite properly refused to consider the propriety of an injunction whereby it might accomplish by indirection that which it was without power to do directly.

IV.

As to the second point the Illinois law is neither uncertain nor incomplete as shown above,* but the proper forum for its application is the Illinois court, not the Federal court, despite the diversity of citizenship. On at least two recent occasions this Court has expressed itself as to the propriety of the exercise of Federal jurisdiction where remedies were available to non-resident litigants under the State law. The cases are *City of Chicago* v. *Fieldcrest Dairies,* 316 U. S. ....., 86 Law. Ed. 888, and *Brillhart* v. *Excess Insurance Co.,* 316 U. S. ....., 86 Law. Ed. 1136, decided in April and June of this year.

* For example see the conclusion of the court in the *Des Plaines* case 335 Ill. 213, 216.

In the first case after speaking of the "sound discretion which guides the determination of courts of equity" the Court held at page 890:

> "In this case that discretion calls for a remission of the parties to the state courts which alone can give a definitive answer to the major questions posed. Plainly they constitute the more appropriate forum for the trial of those issues. See 54 Harvard L. Review 1379. Considerations of delay, inconvenience, and cost to the parties which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole."

In the second case in which it appeared that the Missouri law was doubtful, (certainly not apparent in the case at bar) this Court concluded that it was not its function to find its way through a maze of local statutes and decisions on so technical a subject as the scope of a garnishment proceeding, holding at page 1140:

> "We are not concerned here with the burden of proof in establishing facts as to which only the parties to a private litigation are interested. We are concerned rather with the duty of the federal courts to determine legal issues governing the proper exercise of their jurisdiction."

The problems arising in the spreading and confirmation of a special assessment proceeding in Illinois are purely local. They can be properly solved only in the Illinois courts. The suggestion made by the respondent at page 9 of its brief that the District court "could take jurisdiction of the entire state court matter, the proceeding in the County court, follow it through, and see that justice is done" files squarely in the face of the conclusions so recently reached by this Court in the cases above cited. These problems which, of course, must be met by the District court, in the event of the exercise of jurisdiction by

it, were perfectly apparent to the late Judge Woodward, who heard the case in that court and who observed during the argument (R. 246):

> "You want this court to take charge of the further procedure in the special assessment proceedings. I would have great hesitancy in doing that."

The District Judge obviously had a keen and "scrupulous regard for the rightful independence of the State governments." He dismissed the Bill, quite properly declining to take coercive action against an Illinois municipal corporation and its officials. To do otherwise would have been to embark upon litigation, replete with the possibility of hostility between himself and the Judge of the County Court of Lake County.

V.

We insist therefore, that the only cause of action properly alleged against these petitioners was that which sought to compel the filing of a certificate of cost and completion in the County court, and the question was whether or not the Federal equity court was competent to exert the desired coercion through the medium of a mandatory injunction. The right claimed was one created by State law but not enforceable in an Illinois equity court. It is elementary that parties have no right of access to Federal equity courts unless their matter is one of an equitable nature and there is certainly nothing about the respondent's substantive right which is inherently equitable in character. Coercion of public officials to perform their public duties is not one of the recognized heads of equity jurisdiction. The State statute had nothing to do with general principles of equity, nor with Federal equity jurisdiction and since the State equity court could not grant relief the same disability attached to the Federal court.

We conclude that the writ of certiorari should issue as

prayed. The decision of the Court of Appeals below is in direct conflict with that of *Fineran* v. *Bailey,* 2 Fed. (2nd) 363 in the Fifth Circuit and is clearly opposed to the most recent pronouncements of this Court in the *Fieldcrest* and *Brillhart* cases.

Respectfully submitted,

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